TEXAS AND PACIFIC RAILWAY CO.,

Plaintiff in Error,

vs.

ANDY ARCHIBALD,

Defendant in Error.

TEXAS AND PACIFIC RAILWAY CO.
Plaintiff in Error.

vs

ANDY ARCHIBALD,
Defendant in Error

Cause pending in the Supreme Court of the United States at Washington, October Term A. D. 1897.

BRIEF FOR DEFENDANT IN ERROR.

We cannot altogether agree with the statement of the case contained in the brief for plaintiff in error, while in the main it is correct. Our objection is more to the idea conveyed than to the language used. The idea conveyed in the brief is, that there were two railroad yards, one at the junction, the other down town, while in fact there is but one railroad yard, which includes both the down town tracks as well as the junction tracks. Howell was yard master, both at the junction and down town; Jones was inspector and Archibald was one of the switch-

men who, under Howell, did the switching at Shreveport, whether at the junction or down town. The witnesses all speak of the territory as the Shreveport yard. (See evidence of Archibald, Tran. page 9 and of Howell page 11 and of Jones page 12 and of Harris page 13). From a review of the evidence there can be little doubt that the yard included both places and was all under Howell as yard master, with one inspector and one set of switchmen, Archibald being one of them. The company kept a car inspector in the Shreveport yard, Mr. Jones, who says that he did not inspect cars coming to the down town part of the yard, that he inspected at the junction.

The company kept a car inspector in the Shreveport yards is testified to by Archibald. (Trans. page 9. Both Howell, and Jones, the inspector, testify that no cars were inspected coming into the down town part of the yard The defence to the action is right at this point, if indeed any defence was offered to it, viz: that the company did not inspect cars coming into the down town yard to be loaded and retnrned and that Archibald knew or with ordinary care could have known of this custom. There was no controversy as to how he was hurt, or as to

the agency causing the injury. It is not pretended that the car was not defective in the manner complained of, or that Archibald was not hurt just as he testifies, or that his right arm was not crushed and amputated. There is no denial of the fact that an iron rod connected with the brakes was loose from its fastenings, that there was a hook on the end with two or three feet of chain and that this rod was under the car and that when the car was moved so as to be uncoupled that the motion of the car pushed the rod out into the space in which Archibald was standing to do his work, in fact there is no denial of the condition of the car as Archibald states it, or that he was hurt just as he testifies. (*See Tran. pages* 9 *and* 10.) It is effect admitted that the car was in bad order and that the company had taken no steps to ascertain its condition, while requiring its servants to handle them.

The defense is a novel one, for it is simply this "the company neglected what the law says that it shall do, viz: furnish its servants with tools, cars and appliances reasonably safe and this neglect of duty is made its only defence, that Archibald knew or might have known that the company neglected a legal duty; that he knew or he might have known

that the company did not inspect cars coming into the yard to be loaded with oil."

The company required its servants to handle these cars, because Archibald and Howell both testify that he was working with and under the order of Mr. Howell when he was hurt. (*Tran. pages* 9 *and* 11.

It is the duty of the master to furnish the servant with tools and appliances, reasonably safe, for the work in hand. It is the duty of a railway company to furnish its servants with cars reasonably safe, if the servant is required to handle them. This is an absolute duty fixed on the master, which he cannot evade or delegate to another. *He must do this and for neglect there is no excuse except such hidden defects as cannot be discovered by careful inspection.*

Wharton on Negligence, sections 209-211; Rorer on Railroads 1211.

Cooley on Torts, p. 561; Hough vs. Ry. Co., 100 U. S., p. 215; 25 N. Y., p. 565; 105 N. Y., p. 159.

Out of the rule above stated has grown another, not so much a rule of law as a rule of practice among railroads themselves, that it is the duty of the company to inspect all cars which the servant is required

to handle, whether its own cars or the cars of another road and to know that they are in a reasonably safe condition. The duty is on the master to furnish safe cars when he requires the servant to handle them, the servant may presume that the master has obeyed the law and that the cars are safe. The servant is not required to inspect them, only he may not close his eyes to defects apparent from observation.

Ford vs. Ry. Co., 110 Mass., p. 240-260; 59 N. Y., p. 617; Ry. Co., vs. McElyea, 71 Texas, 386; Ry. Co. vs. Snyder, 152 U. S., 684; Rv. Co. vs. Herbert, 116 U. S., 652; Baily on Liability of Master to Servant, page 101.

The servant may rely on the master having performed his duty and need not inspect the car himself and the master is liable to the servant when he requires him to work with an unsafe car, when an inspection would have shown the danger.

Eddy vs. Prentiss 27th Southwestern Reporter, 1063.

There is no doubt that the plaintiff was required to handle this car, as well as all cars coming to be loaded with oil and he is injured while handling such a car, under orders from the yard master.

There is no doubt that an inspection would have disclosed the defect and have saved the plaintiff from injury, but the company says there is no liability, because we did not inspect cars coming to be loaded with oil and Archibald knew of the custom or he could have known it by the exercise of ordinary care.

What reason is given for not inspecting them? Did the company not require Archibald to handle them? Was the company not bound to furnish safe cars, where it required its servants to work with them? What then in reason or in law, released the company from this duty in respect to these cars, more than with others? One witness, Mr. Jones, the inspector, volunteered a statement, that it was the duty of the Cotton Belt road to inspect them and not the duty of the defendant company. But suppose that the Cotton Belt did not inspect, as it certainly did not inspect this car, did that road owe any duty to Archibald? It was under no obligation to furnish him with safe cars, that duty was on the defendant company whose servant he was. He is required to handle a car that is unsafe, the company gives him no warning of its condition so that he can be on guard against injury, but in response to his complaint for this neglect of duty it tells him, you

knew or you should have known, that cars coming for oil were not inspected and therefore you cannot recover. The idea seems to be that as these cars were only carried about a mile and placed on the oil mill track and returned when loaded, that there was no obligation on the company to furnish safe cars, or that it was under no obligation to look to their condition, although at the same time its servants are required to handle them. If the car only goes a mile and back, there is no need to look to its condition, but if it is to go an hundred miles, then it must be looked to. But the servant is injured within the mile while the master required him to handle such a car. Has the master performed the duty required of him by law? Has he furnished the servant with a safe car to handle? Surely the master must be liable.

Without doubt, the servant takes on himself the ordinary risks incident to the business in which he is engaged, but he takes no risk of negligence on part of the master, yet we are gravely told by the learned counsel in their brief, that although the company neglected its duty and failed to furnish cars reasonably safe to handly, that because the company failed to inspect such cars and because

Archibald knew or should have known, that it did not inspect them, therefore he cannot recover, in other words, because the company neglects one duty, it is thereby excused from another. The whole truth of the matter is in the volunteer statement of witness Jones, the company expected the Cotton Belt road to attend to these cars and failed to do so itself.

The contention of the learned counsel in their brief is this, that if Archibald knew that the company did not inspect such cars, or if by reasonable care he could have known it, then he cannot recover and such was the opinion in part of the judge who tried the case below. Archibald swore that he did not know of any such regulation or custom, and the judge charged that if he knew of the custom, he could not recover. The defendant then asked him to charge that if he knew of the custom or in the exercise of reasonable care he could have known it, he could not recover, but the judge would not go beyond the actual knowledge, and refused to give the charge as asked. This contention of the learned counsel is neither supported by reason or authority. Did the failure to inspect cause the injury, or was it the neglect to furnish reasonably safe cars? There

is no law requiring the master to inspect cars, but there is a law that the cars furnished shall be reasonably safe to handle. If he provides safe cars, it does not matter whether he ever inspects one. He may inspect them every hour in the day, but if he fails to remedy the defect, the inspection will not avail him. Inspection is a means by which the master finds the condition of the car, but it does not make it safe. The inspection enables the master to perform his legal duty to furnish safe cars, but it is not the only means. A car may never have been inspected, yet may be perfectly safe to handle; would it be for a moment contended, that if the car was reasonably safe, but had not been inspected, that a servant injured while handling it could recover because it had not been inspected? The charge given, as well as the charge refused, makes the plaintiff's right to recover to depend on his knowledge, of the custom not to inspect such cars, and to that extent is stronger against the plaintiff than the law permitted.

If the failure to inspect made the master liable of itself, and the suit was for that failure, then the knowledge of the plaintiff would possibly preclude him, or if the failure to inspect was the proximate

cause of the injury, then the knowledge of plaintiff would be a material issue in the case. But the cause of the injury, was the rod, loose from its fastenings, that struck the plaintiff and threatened him with injury greater than he received.

We will go a step further and say, that if Archialdb had actual knowledge that the car with which he was working had not been inspected and was ordered by his superior to go and uncouple it, as he did, but knew not of the defective brake rod, loose from its fastenings and was injured in the manner shown by the evidence, he should recover, because the master has failed in a duty he owed to his servant to furnish reasonably safe cars. Because the servant has the right to believe that the master has done his duty and he is fully authorized to act on that belief, and is not required to examine as to their safety. Of course he would not be permitted to close his eyes to danger that would be apparent to any one approaching the car, but he need not look for defects that are hidden from ordinary observation.

(Rorer on Railroads, pages 1211 to 1217, where the whole subject is most ably discussed). Cooley on Torts, page 561. Railway Company vs. Herbert,

116 U. S. 652. Hough vs. Railway Company, 100 U. S. 215. Railway Company vs. Mackay, 157 U. S. 73. Ford vs. Railway Company, 110 Mass. 240. Railway Company vs. Snyder, 152 U. S. 684. 59 N. Y. 517. Crenshaw vs. Railway Company, 71 Texas 344. 25 N. Y. 565. 105 N. Y. 159. 61 Mo. 492. 38 Wis. 289. 65 Mo. 514.

The duty of railway companies in handling cars of other roads is practically the same in handling their own cars. This duty is ably discussed by Mr. Justice Harlan in the case of Railway Company against Mackay, 157 U. S., above cited, where he says: "The duty of a railway company to take due care that foreign cars hauled by them shall be in such condition as to be safely handled by its own employees. The employees are obliged to handle every car in the train in the same manner without respect to ownership and are exposed to the same danger from defects, that may attend the management of the cars of the road that employs them. It would be most unreasonable and cruel to declare that a faithful workman may obtain compensation from a company for a defective arrangement of its own cars; he would be without redress against the same

company if the damaged car that occasioned the injury happened to belong to another company."

In the opinion in Mackay's case, Judge Harlan cites with approval the case of Gottleib vs. Railway Company, 100 N. Y., in which the New York court says: "A railroad company is bound to inspect cars of another company used on its road just as it would inspect its own. It owes this duty as master *and is responsible for the consequences of such defects as could be disclosed by ordinary inspection.* When cars come in which have defects discernable, by ordinary examination, it must remedy the defects or refuse to take them."

We have searched in vain for a single case, either in the text books or in the adjudged cases, that limits or in any manner varies the rule as to the duty of the master to furnish reasonably safe appliances for the servant to work with. It is a duty the master cannot evade. He may appoint agents to supply safe appliances, but their failure is his failure; he may appoint agents to inspect, to determine their safety, and their neglect is his neglect; they may inspect and may discover no defect, but if a proper inspection would have discovered the defect, he is liable; the inspection may discover the defect,

but unless remedied it is no defence. If, however, a proper inspection failed to discover the defect, then the master is not liable.

The cases quoted establish that the duty to furnish safe tools, cars and appliances, is on the master and may not be shifted or evaded. *He must exercise ordinary care to supply to the servant safe appliances and like care to keep them safe; he must use the same care to ascertain the safe condition of cars coming from other roads as he is to take of his own cars. If he requires the servant to handle the foreign car without looking to its safety and the servant is injured by some defect, that ordinary care would have disclosed and remedied, then the master is liable.*

But the defendant below required the court to go beyond actual knowledge of the failure to inspect these cars and asked the court to charge that Archibald, by the exercise of ordinary care, could have known of the custom not to inspect these cars, that he could not recover. The court refused to so charge, in this is the only question in the case.

The proposition stripped of its surroundings, is simply this: If Archibald knew the master was neglecting one of the means of ascertaining the condition of the cars, that he cannot recover. It makes

the inspection take the place and fill the measure of the master's duty and leaves out of the question his real duty to furnish safe cars. But it is not a legal duty to inspect any cars, the duty is to furnish safe cars and the inspection is only to enable the master to do his duty and is not itself the duty that he owes.

If the master knew the cars were safe, surely the failure to inspect them would not make him liable, and if they were not safe an inspection alone would not shield him from liability. If the inspection was a legal duty, which being performed, shielded the master from liability, it would be different, or if the failure to inspect made him liable, it would be different.

The charge was properly refused, because of the knowledge of Archibald of the custom not to inspect these cars would not relieve the master from his legal duty to furnish safe cars. Inspection alone would be no defence and the failure to inspect would not alone render him liable for the injury.

If inspection is a legal duty, evidently Archibald could claim nothing if he knew it was not performed. But must he exercise care to know that this duty is neglected by the master? It is not neg-

ligence to fail to anticipate that another will violate the law in a given particular and in failing to provide against such violation.

(Thompson on Negligence, vol. 2, page 1172, section 18. Railway Company vs. Grey, 65 Texas 32).

Even though Archibald knew the company had not on former occasions inspected these cars, if the law made inspection a legal duty he would not be authorized to anticipate that it would be guilty of further neglect. The servant is not bound to anticipate that the master will violate the law and neglect a legal duty and is not bound to provide against such anticipated neglect.

2 Thompson on Negligence, page 1172, section 18. Railway Company vs. Grey, 65 Texas 32. Kellogg vs. Railway Company, 26 Wis. 223. Fox vs. Sacket, 10 Allen 535. 44 Iowa 276. 44 Cal. 414. Railway Company vs. Terry, 8 Ohio State 570. Frazer vs. Sears, 12 Cal. 555. Brown vs. Lynn, 31 Penn. St. 510. Dorsey vs. Railway Company, 42 Wis. 583.

The contention that the servant must exercise ordinary care to discover and anticipate the neglect of a legal duty by the master cannot be supported by

either reason or authority. But there is still another question: Must he be held to reasonable care to discover something that did not injure him? He was not injured by the custom not to inspect these cars, but by the iron rod, loose from its fastenings, but concealed under the car, but which was forced by the motion of the cars out into the space where he was standing. If the charge had been asked, that if he saw the rod, or by ordinary care he could have seen it and knowu of its condition, it should have been given. But the defendant, as well as the learned district judge, seemed imbued with the idea that he was injured by the failure to inspect these cars, when at best it was only a neglect by the company of one of the means by which the master could have ascertained the condition of the cars.

The company has neglected a duty that the law fixes on it, a servant is injured by this neglect, surely the company is liable.

None of the cases cited by the learned counsel in their brief touch the question presented in this case, nor do we doubt the position they so earnestly labor to establish, viz: that the servant assumes the ordinary risks incident to the business in which he is engaged. This is clearly the law, but the neg-

lect of the master is not one of the assumed risks The case of Railway Company vs. Minick is not in point, for there was no legal duty on the company to put watches at the bridge and Minick knew that none were kept. He could estimate the danger to which he was exposed and the danger from fire, and took the risk. Hewit vs. Flint, etc. 67 Mich., has no application here, because the party was injured by a car, run in the manner that he knew the defendants were in the habit of running them. They had the right to run the cars just as they did and Flint, if he thought it unsafe to work with them, could quit the service, but elected to remain and was injured, clearly he had taken the risk. And so with every case cited in the brief of counsel, the complaining party knew or could have known of the existence of the very thing that caused the injury, and remained in the service.

In this case the question is altogether different, here the master neglects a duty that the law fixes on him and which he cannot evade or delegate to another. He also neglects one of the best means discovered for ascertaining whether the cars are safe and the servant might have known (as is claimed) that the master was in the habit of neglecting this

means of discovering the condition of the cars, and it is now claimed that because the servant might have known that the master did not resort to inspection to discover the condition of the car that he cannot recover. If the failure to inspect caused the injury, the authorities would apply, but as it was the failure of the master to furnish safe cars for the servant to work with, and there is no pretense that the master was in the habit of furnishing unsafe cars.

The last proposition presented in the brief of counsel, is that it is not the duty to inspect unless the car is to go into a train, but if only to be switched, from one road to another and returned. We are not aware of any law that requires the master to inspect a car for any purpose, but the law does require him to furnish safe cars and a proper inspection is the best means of ascertaining when it is a safe car. The master need not inspect provided he furnishes cars that are reasonably safe.

The authorities cited in support of the proposition do not support it. We have already referred to both the Mackay and Gottleib cases and will not discuss them further than to say they do not support the contention.

The proposition is unreasonable, that a railway company calls on its servants to handle a car, without having taken precautions to see that it safe and the servant is injured, and they say, because the car was not to go out on the road, the company is not liable.

Nor is there anything in the pretense, that the company would have to go into the yard of another company to inspect it, that is not necessary in this case because the evidence shows that the Cotton Belt road delivered the cars on the track of the defendant company and when so delivered the servants of the defendant are required to carry them and deliver them to the oil mill and when ready to carry them back and deliver them to the other company. Is it the duty of any one to furnish safe cars for this purpose? Is it per chance a case where no one is responsible to the injured servant? The Cotton Belt road was under no obligation to Archibald; it owed him no duty, but had he went on that company it would have replied, we owe you no duty and are under no obligation to you and it would be correct.

The only question it seems to us is this, did the defendant require its servants to handle these cars? The testimony of all the witnesses answers it in the

affirmative, for plaintiff was working with one of the cars, by order of the master when he was hurt. If then the master required the servant to handle the cars, the law fixes on him to see to it that the cars are reasonably safe. It does not matter how the master ascertains that the car is safe, he may inspect it or he may rely on the connecting road to furnish none but safe cars, but if he fails to furnish cars that are reasonably safe, when he requires the servant to handle them, he is liable. It matters not whether the car has to go ten feet or a thousand miles, if the master orders the servant to handle it and the car is unsafe, the master is liable.

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